UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THOMAS C. JOHNSON, Petitioner,	:	
v.	:	C.A. No. 03-72 S
ASHBEL T. WALL, R.I. Department of Corrections, PATRICK C. LYNCH, R.I. Attorney General, Respondents.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge.

This matter is before the court on the pro se application of Petitioner Thomas C. Johnson ("Petitioner" or "Johnson") for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("the Petition"). The State of Rhode Island ("the State") has moved to dismiss the Petition because Petitioner has failed to exhaust his state remedies. This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and Local R. 32(c). The court has determined that no hearing is necessary. For the reasons explained below, I find that Petitioner has not exhausted his state remedies, and I recommend that the Petition be dismissed without prejudice.

Facts and Travel[1]

On December 1, 1995, the Rhode Island Supreme Court affirmed Petitioner's conviction for the 1992 first degree murder of his common-law wife. See State v. Johnson, 667 A.2d 523 (R.I. 1995). The facts which gave rise to Petitioner's

[1] The travel is taken largely from the Petition which, for purposes of this report and recommendation, is assumed to be true.

conviction are set forth in detail in that opinion, see id. at 525-527, and they are summarized here.

On the night of July 31, 1992, Petitioner, his wife, their two young sons, and a niece went to the home of Bobby and Audrey Coogan in Pawtucket, Rhode Island, for a visit. See State v. Johnson, 667 A.2d 523, 525 (R.I. 1995). While there, Petitioner slapped his wife across the face. See id. Shortly thereafter, Petitioner left the Coogan home. See id. Petitioner's wife and the children departed approximately an hour later and were driven home by Petitioner's brother, who had arrived at the Coogan home just as Petitioner was leaving. See id. At the trial Petitioner's brother testified that when he dropped Petitioner's wife and sons off at their home shortly after 11:00 p.m., he observed Petitioner's car parked in front of the house and saw Petitioner through the kitchen window. See id.

At 12:26 a.m. on August 1, 1992, the Pawtucket police department received a telephone call from Petitioner, stating that there was a body on the floor of his living room. See State v. Johnson, 667 A.2d 523, 525 (R.I. 1995). When asked for further information, Petitioner stated that he could not "explain it at the moment." Id. Rescue personnel were dispatched to Petitioner's home and found him standing outside the front door. See id. A firefighter asked Petitioner about the problem which had prompted the call to the police. See id. Petitioner answered that "You will see when we get upstairs." Id. Inside the apartment, Petitioner's wife was found dead on the floor. See id. She had multiple stab wounds, injuries to her shoulder, bruises on her arms, and "a very large amount of blood over her right shoulder area." Id. Petitioner told a police officer, who had also responded to

the call, that "Yes, I'm the only one here," id., and "I'm hallucinating, but I haven't been doing any drugs," id. The officer observed no signs of forced entry into the apartment, but in the kitchen noticed eating utensils, including knives, lying about. See id. Petitioner was placed under arrest and escorted outside. See State v. Johnson, 667 A.2d 523, 525 (R.I. 1995).

Additional police officers who arrived subsequently discovered Petitioner's two young sons asleep in one of the bedrooms. See id. The officers also seized a knife from the pantry sink. See id. At Petitioner's trial, the medical examiner testified that the knife was "compatible" with the wounds on the victim's body, id., and the acting director of the Rhode Island State Crime Laboratory testified that tests confirmed the presence of human blood on the knife, see id.

Detectives interviewed the Coogans at their home shortly after 2:30 a.m. on August 1, 1992. See id. Upon entering the residence, one of the detectives noticed the message light on the couple's telephone answering machine was blinking. See State v. Johnson, 667 A.2d 523, 525-26 (R.I. 1995). The detective asked for the messages to be played. See id. at 526. All three were from Petitioner:

> 1. "This is Thomas. It's an emergency. Please. Hello. This is an emergency. All right, I'll call the police then. Thank you."
> 2. "Bobby Bobby. Did I take Maggie home with me? If so, I killed her. Please pick up."
> 3. "Yeah, Bobby! Tommy Johnson. I think I'm gonna need drastic help. Really. Get a hold of me as soon as you can. Please. Thank you."

Id.

At approximately 3:30 a.m., Petitioner gave a videotaped

statement to the police in which he claimed to have no memory of events from the time he left the Coogan home until the time he found his wife on the floor of the apartment. See id. According to Petitioner, "she was laughing and wanted to make love, and that only when he tried to help her up did he notice the blood on her hair and neck. The police then asked [Petitioner] whether he had killed his wife, to which question he responded that he did not know but hoped he had not." State v. Johnson, 667 A.2d 523, 526 (R.I. 1995).

At the trial, Petitioner's eight year old son testified that after he had gone to bed on the night his mother died, he heard his parents arguing and that when he looked into the kitchen through a peephole, he saw his father hit his mother. See id. The boy stated "that his parents then went into the parlor and that he did not see either of them again until his father walked into the bathroom with red paint 'all over him.'" Id. The boy further testified that "he heard his father 'washing the paint off' and saw his father remove a green garbage bag from the house." Id.

Petitioner was found guilty on September 27, 1994. See id. He was sentenced to life imprisonment on October 18, 1994. See id.

Petitioner alleges that on March 3, 1995, his court appointed appellate counsel "filed a direct appeal, without consulting with Petitioner." Petition at 3. On April 28, 1995, Petitioner filed a motion to dismiss his appellate counsel. See id. Following a conference on June 22, 1995, the Rhode Island Supreme Court issued an order, denying the motion to dismiss but stating that Petitioner could file a supplemental pro se brief. See id. On September 8, 1995, Petitioner notified the court that his counsel and the

superior court would not provide him with the trial transcript. See id. Despite this notification, Petitioner's appeal proceeded without abatement, and it was denied on December 1, 1995. See id.

Petitioner subsequently applied for post-conviction relief pursuant to R.I. Gen. Laws §§ 10-9.1-1 to 10-9.1-9-12 (1997 Reenactment).[2] An attorney was appointed to represent Petitioner in his post conviction relief application, and the attorney entered his appearance on November 18, 1997. See Petition at 3. Petitioner alleges that the attorney did "absolutely nothing for a whole year ...," id., and did not even meet with Petitioner, see id. Petitioner moved to dismiss the attorney, and Petitioner appeared in the superior court on November 16, 1998, apparently for a hearing on his motion. See id. The hearing judge informed Petitioner that the attorney was on trial and that Petitioner would be brought back to court in two weeks. See id. at 4. However, Petitioner was returned to court the next day, November 17, 1998, and advised that the attorney had moved to withdraw on conflict of interest grounds because he had previously worked for the Department of Attorney General. See id. The hearing judge told Petitioner that he would appoint another attorney for Petitioner within one week. See id. Although Petitioner was brought to the courthouse on November 30, December 7, and December 14, 1998, he was not taken into the courtroom. See id.

Notwithstanding the hearing judge's statement that another attorney would be assigned to represent Petitioner, no

[2] The date Petitioner applied for post-conviction relief is not stated in the Petition or in the State's Memorandum in Support of Its Motion to Dismiss the Applicant's Petition for Writ of Habeas Corpus (State's Mem.).

attorney contacted Petitioner, and his weekly trips to the courthouse ceased after December 14, 1998. See Petition at 4. Frustrated, Petitioner prepared his own post conviction relief application ("PCRA"), and on September 28, 2000, he delivered the PCRA and a Motion to Appoint Counsel (to argue the PCRA which Petitioner had prepared) to prison officials for mailing. See id. Petitioner's PCRA consisted of some 337 pages, of which 44 pages were designated as the "Application," 160 pages were described as "Facts," and 133 pages were deemed "Exhibits." The PCRA was received by the court on October 5, 2000, and docketed on October 19, 2000. See id.

On January 24, 2001, Petitioner wrote to the presiding judge of the superior court, Joseph F. Rodgers, Jr., inquiring as to the status of his PCRA and Motion to Appoint Counsel. See Petition at 4. Judge Rodgers replied on January 29, 2001, and informed Petitioner that Judge (now Chief Justice) Frank Williams had appointed an attorney on January 24, 2001, to represent Petitioner in his PCRA. See id.

In April of 2001, Petitioner filed a Motion to Adjudge in Contempt because this second court appointed attorney had failed to respond to Petitioner's telephone calls and letters and would not confirm that he had been appointed to represent Petitioner. See id. at 4-5. Petitioner requested that the Motion to Adjudge in Contempt be heard on May 3, 2001, but he was not brought to court on that date. See id. On May 14, 2001, Petitioner appeared before Judge Michael A. Silverstein on the Motion to Adjudge in Contempt, but the attorney failed to appear and the hearing on the Motion to Adjudge in Contempt was continued until May 29, 2001. See id. at 5.

When Petitioner was before Judge Silverstein on May 14, 2001, he informed the judge that the State had not responded

to his PCRA which he had filed seven months earlier and that it had offered no excuse for the delay in doing so. See Petition at 5. According to Petitioner, Judge Silverstein suggested that Petitioner consider filing a motion for entry of default. See id. Petitioner stated that he would file such a motion and requested that it also be heard on May 29, 2001, with the Motion to Adjudge in Contempt. See id.

On or about May 15, 2001, the State filed a motion to dismiss Plaintiff's PCRA. See State's Memorandum in Support of Its Motion to Dismiss the Applicant's Petition for Writ of Habeas Corpus ("State's Mem."), Attachment ("Att.") 1 (State's Motion to Dismiss Plaintiff's Complaint)("Motion to Dismiss PCRA"). Among the grounds for dismissal alleged by the State was that the PCRA consists of "340 pages of duplicative allegations, broken down into 41 separate grounds. [The Complaint] fails to contain a short and plain statement of a claim as required by Rule 8(a)." State's Mem., Att. 1 (Motion to Dismiss PCRA).

Petitioner was brought to the courthouse on May 29, 2001, and again on June 18, 2001, but he was not brought into a courtroom on either occasion. See Petition at 5. On June 25, 2001, Petitioner appeared before Judge Stephen J. Fortunato, Jr. See id. At that time, Petitioner's Motion to Adjudge in Contempt his second attorney was denied,[3] a motion by the State for an enlargement of time within which to respond to the PCRA was "held in abeyance," id., and the State's Motion to Dismiss PCRA was denied, see id. Judge Fortunato indicated that the court would appoint new counsel within fourteen days.

[3] Petitioner alleges that the motion to adjudge his second court appointed attorney in contempt was denied even though the attorney again failed to appear for the hearing. See Petition at 5.

See id. Plaintiff's Motion for Entry of Default was "not listed on the docket sheet," id., and was apparently not addressed at the hearing. See id.

A third attorney was appointed by the superior court on June 26, 2001, to represent Plaintiff in his PCRA. See Petition at 5. Petitioner was brought to superior court on August 7, 2001, but he was not brought into a courtroom. See id. On September 27, 2001, he was again taken to superior court, although not to a courtroom. See id. at 6. On this occasion the third attorney came into the cellblock and handed Petitioner a copy of a "'no-merit' memorandum," Shatney v. State, 755 A.2d 130, 136 (R.I. 2000), in the form of a three page single spaced letter from the attorney to Judge Fortunato, see Petition at 6; State's Mem., Att. 2 (Letter from Attorney Judith Crowell to Judge Fortunato of 9/7/01). In the letter the attorney stated that after reviewing the court file, the four volume trial and sentencing transcript, Petitioner's pro se PCRA, and speaking with Petitioner, she was unable to identify "any legal issue having arguable merit ...." State's Mem., Att. 2 (Letter from Attorney Judith Crowell to Judge Fortunato of 9/7/01) at 1.

At a hearing on October 18, 2001, the report from the third attorney was accepted by Judge Fortunato, and she was allowed to withdraw as counsel. See id., Att. 3 (Order of 10/18/01, Fortunato, J., entered in C.A. No. PM-2000-5483). Judge Fortunato also indicated that Petitioner's PCRA was unacceptable in its present form and that Petitioner would have sixty days to file a thirty page brief. See Petition at 6. Petitioner alleges that the order which the State subsequently drafted to reflect Judge Fortunato's ruling incorrectly stated that Petitioner had sixty days to file a

ten page brief.[4] See id.

On October 25, 2001, Petitioner wrote to Judge Fortunato and requested an explanation of the ruling. See id. He asked three questions of Judge Fortunato: "1) What exactly do you want me to take out; 2) The reasons why you want me to take it out; and 3) If I do take it out, will it be deemed waived?" Id. According to Petitioner, Judge Fortunato did not reply. See id.

Petitioner was returned to superior court on April 19, 2002, for a hearing on his Motion for Entry of Default, but the motion was denied by Judge Fortunato. See id. at 6-7. On June 27, 2002, Petitioner filed a Motion for Clarification, to which he alleges the court has not responded. See Petition at 7. Thereafter, he wrote "to the Administrative Clerk of Court on August 3, 2002, concerning his Motion for Clarification ...." Id. Presumably, Petitioner received no response to his letter, although he does not explicitly so state in his Petition. See id.

According to the State, Petitioner never complied with the October 18, 2001, order, see State's Mem. at 2, although

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[4] The pertinent portion of the Order concerning Judge Fortunato's October 18, 2001, ruling states:

> 3. That Plaintiff Johnson is ordered to file a new, short and plain statement of a claim, not to exceed 10 pages, with the court within 60 days. Johnson's failure to comply with this order will result in dismissal of his complaint without prejudice.
>
> 4. That the State shall have twenty days to answer Johnson's amended complaint upon receipt of said complaint from the clerks [sic] office.

State's Mem., Att. 3 (Order of 10/18/01, Fortunato, J., entered in C.A. No. PM-2000-5483).

apparently his PCRA has not been dismissed and remains pending, see id. On November 2, 2001, Petitioner filed a notice of appeal from the October 18, 2001, conditional order of dismissal, see id. at 2 n.3, but there is no indication that any action has been taken regarding this appeal.

On March 4, 2003, Petitioner filed the instant Petition in this court along with a Motion for Appointment of Counsel. Both matters were subsequently referred to this Magistrate Judge. The Motion for Appointment of Counsel was referred for determination on March 5, 2003, and the Petition was referred for findings and recommendations on April 3, 2003. The State's Motion to Dismiss Applicant's Petition for Writ of Habeas Corpus ("Motion to Dismiss") was also filed on April 3, 2003.

Law

> A federal court may not issue a writ of habeas corpus unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

Tart v. Massachusetts, 949 F.2d 490, 494 (1st Cir. 1991)(citing 28 U.S.C. § 2254(b)(1);[5] Ex parte Royall, 117 U.S. 241,

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[5] 28 U.S.C. § 2254(b)(1) provides in relevant part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--
> (A) the applicant has exhausted the remedies available in the courts of the State; or
> (B)**(i) there is an absence of available State corrective process; or**
> **(ii) circumstances exist that render such process ineffective to protect the rights of the applicant**.

250-54, 6 S.Ct. 734, 739-41, 29 L.Ed. 868 (1886))(internal quotation marks omitted).

Discussion

Petitioner claims that he should be "excused from exhausting his state remedies pursuant to 28 U.S.C. § 2254(b)(1)(B)(i) and (ii), because the State Court refuses to reach the merits of his claim, and has caused inordinate delays ...." Petition at 2-3. Noting that he is proceeding pro se, that he is untrained in the law, and that it took him two years to prepare his PCRA, Petitioner argues that Judge Fortunato's ruling which required him to file a ten page brief "was unjust, unfair, and a subterfuge to avoid addressing the violations of his Federal and State Constitutional Rights." Id. at 6.

Although Petitioner cites both subparagraphs (i) and (ii) of § 2254(b)(1)(B) as a basis for excusing him from complying with the exhaustion requirement, see Petition at 2, it is clear that there is an "available State corrective process," namely the Rhode Island Post Conviction Remedy, R.I. Gen. Laws §§ 10-9.1-1 to 10-9.1-12 (1997 Reenactment)(2002 Supplement). Petitioner's PCRA specifically states that it is a "Petition for Post Conviction Relief ... filed pursuant to Rhode Island General Law[s] § 10-9.1-1." PCRA at 1. Moreover, the state superior court appointed three attorneys to represent Petitioner for the purpose of pursuing relief pursuant to that statute. Therefore, I find that subparagraph (i) is inapplicable and does not provide a basis to excuse Petitioner from exhausting his state remedies.

Thus, if the exhaustion requirement is to be waived, it

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28 U.S.C. § 2254 (2000)(emphasis added).

must be waived on the basis that "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(ii) (2000). Although he does not state so directly, presumably Petitioner's contention is that the problems he has experienced with appointed counsel, with court hearings that did not occur as scheduled (or for which he was not brought into the courtroom), with the State failing to respond in a timely manner to his PCRA, with the superior court's allegedly belated imposition of a page limitation on his PCRA, and with the superior court's failure to respond to his letters and Motion for Clarification, collectively, constitute circumstances which render the Rhode Island Post Conviction Relief Remedy ineffective. This court assumes that Petitioner contends that the five and one half years consumed by these problems demonstrates that the post conviction remedy process is ineffective to protect his rights.[6]

Turning to the first of these problems, this court does not condone attorneys who neglect or ignore their responsibilities as court appointed counsel. If the facts are as alleged by Petitioner, certainly the first and, arguably, the second attorney appointed to represent Petitioner in his PCRA failed to act with reasonable diligence. However, the record indicates that the third attorney did act diligently (although not in a manner satisfactory to Petitioner). She reviewed the court file, the trial transcript, and the PCRA,

[6] Petitioner states in the Petition that he "incorporates by reference the Brief in Support of Petition for Writ of Habeas Corpus." Petition at 7. The court fails to find a document with that title among the filings. Petitioner did file a copy of his state Application for Post Conviction Relief ("PCRA"), and it is possible that this is the "Brief" to which he refers.

spoke with Petitioner, and submitted a written report to the superior court regarding her evaluation of his claims. See State's Mem., Att. 2 (Letter from Attorney Judith Crowell to Judge Fortunato of 9/7/01). Thereafter, Judge Fortunato acted in conformity with the procedure prescribed by the Rhode Island Supreme Court in Shatney v. State, 755 A.2d 130, 136 (R.I. 2000), by allowing the third attorney to withdraw and advising Petitioner that he could proceed pro se, albeit subject to a page limitation. Thus, as of October 18, 2001, any obstacle to Petitioner obtaining post conviction relief in the state court attributable to the failings of appointed counsel had been removed.

Petitioner's claim that on multiple occasions he was taken to the courthouse, presumably for post conviction related proceedings, and that those proceedings were continued, in some instances apparently without Petitioner even being brought before the judge, is not insubstantial, and this court does not view it so. Nevertheless, all (or almost all) of these continuances occurred prior to the October 18, 2001, hearing. After that date, it does not appear that this problem figured in the failure of Petitioner's PCRA to move forward.

The State's failure to file a response to Petitioner's PCRA for seven months provides only limited support for Petitioner's contention that he should be excused from exhausting his state remedies. The sheer massiveness of the PCRA appears to have been a contributing factor in the State's failure to respond. Confronted with such a filing, the attorneys in the Department of Attorney General apparently concluded that it was unduly burdensome to attempt to respond to the PCRA in its present form and that the superior court

would ultimately agree with that assessment. While the State should have filed its motion to dismiss more promptly, thereby bringing the problem of the size of the PCRA to the attention of the superior court, the seven month delay does not weigh heavily in favor of Petitioner.

Despite these delays attributable to problems with court appointed counsel, to unkept court dates, and to the State's delay in responding to the PCRA, the record indicates that as of October 18, 2001, the superior court was willing to entertain Petitioner's PCRA provided he complied with a page limitation. I find that the problems Petitioner had encountered up to October 18, 2001, while not insignificant, by themselves do not demonstrate that the post conviction remedy process is ineffective to protect Petitioner's rights. In making this finding, I note that the largest part of the delay between November 18, 1997, the date the first attorney entered his appearance, and October 18, 2001, is attributable to the time it took Petitioner to prepare and file his own PCRA (some twenty months from December of 1998 to September of 2000). It also appears that after his December 14, 1998, court appearance Petitioner did not make any effort to contact the superior court until September 28, 2000, when he filed his PCRA and Motion to Appoint Counsel.

Therefore, the key issue which this court must decide is whether Judge Fortunato's order, requiring Petitioner "to file a new, short and plain statement of a claim, not to exceed 10 pages, with the court within 60 days," State's Mem., Att. 3 (Order of 10/18/01, Fortunato, J., entered in C.A. No. PM-2000-5483), and the subsequent failure of Petitioner to get a response to his requests for clarification of that order, when considered with the delays and problems which Petitioner had

experienced prior to October 18, 2001, collectively constitute circumstances which render the state post conviction remedy ineffective to protect Petitioner's rights. If they do not, the Petition must be denied for failure to exhaust state remedies.

Judge Fortunato's October 18, 2001, ruling appears to have been a response to the state's claim that Petitioner's PCRA fails to satisfy the requirement of the Rhode Island Superior Court Rules of Civil Procedure that it contain "a short and plain statement of the claim ...." R.I. Super. Ct. R. Civ. P. 8(a); cf. State v. Palmigiano, 377 A.2d 242, 248 (R.I. 1977)(noting that proceedings under the Rhode Island Post Conviction Remedy Act are civil in nature). The State had cited this deficiency in its Motion to Dismiss PCRA. See State's Mem., Att. 1 (Motion to Dismiss PCRA). Although that motion was denied, see Petition at 5, Judge Fortunato's October 18, 2001, ruling indicates that he accepted the State's implicit argument that it was unduly burdensome for the State to have to answer the PCRA in its present form and that Petitioner should be required to file a concise statement of his claim as required by Rule 8(a). Petitioner's pro se status does not exempt him from complying with procedural rules. See Eagle Eye Fishing Corp. v. U.S. Dep't of Commerce, 20 F.3d 503, 506 (1st Cir. 1994)(holding that pro se status "is not a license not to comply with relevant rules of procedural and substantive law.")(internal quotation marks omitted). Therefore, Plaintiff's failure to comply with Judge Fortunato's order of October 18, 2001, cannot be excused on that basis.

Page limitations on post conviction relief applications have been upheld by other courts. In upholding such a

limitation at the appellate level, the Supreme Court of Arkansas explained that:

> All state and federal courts have adopted rules for the administration of justice ....
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> [T]he prompt and orderly disposition of petitions for post-conviction relief requires standards to control the content, length and form of the petitions. Before the rule was adopted limiting petitions to ten pages, it was not uncommon to receive petitions of seventy-five pages or more which consisted of an endless number of allegations which were largely repetitious and meritless. Any person should be able to state legitimate grounds for relief in ten pages.

Maulding v. Arkansas, 776 S.W.2d 339, 340 (Ark. 1989); see also United States v. Battle, 163 F.3d 1 (11th Cir. 1998)(denying motion to file seventy-five page appellate brief in death penalty case); Fleming v. County of Kane, 855 F.2d 496, 497 (7th Cir. 1988)(denying motion to exceed fifty page limitation for appellate brief and noting that "[p]age limitations are important, not merely to regulate the Court's workload, but also to encourage litigants to hone their arguments and to eliminate excessive verbiage.")(citation omitted); Orbe v. True, 233 F. Supp.2d 749, 764 (E.D. Va. 2002)(finding fifty page limit established for state habeas corpus proceedings did not render the state process "ineffective to protect the rights of the applicant.")(quoting 28 U.S.C. § 2254(b)(1)(B)(ii)); Ferris v. Oliveras, No. 93-CV-20214, 1993 WL 1625230, at *2 (N.D. Cal. Nov. 9, 1993)(upholding dismissal of habeas corpus petition and observing that "[p]age limits are an appropriate mechanism for ensuring that appellants focus on their most meritorious arguments and present them clearly and concisely.").

Here Petitioner's PCRA far exceeds the seventy-five page

length of which the court in Maulding was critical. A cursory review of Petitioner's forty-one grounds reveals considerable repetition.[7] Moreover, none of the grounds was found by Petitioner's third attorney to have even "arguable merit," State's Mem., Att. 2 (Letter from Attorney Crowell to Judge Fortunato of 9/7/01) at 1, and three of them in her judgment "merit[ed] no discussion," id. at 2. In addition, included among Petitioner's grounds are issues which appear to have already been decided in his direct appeal.[8] Petitioner may not relitigate these issues in his PCRA. See Argencourt v. United States, 78 F.3d 14, 16 n.1 (1st Cir. 1996).

It does not appear that Petitioner has ever explicitly requested permission from the superior court to file a brief longer than ten pages. Cf. Mueller v. Angelone, 181 F.3d 557, 585 (4th Cir. 1999)(noting that petitioner had not presented evidence that he had filed a motion to file an oversize brief that was denied). Although Petitioner's October 25, 2001, two

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[7] For example, grounds 1-2 challenge the legality of Petitioner's arrest, grounds 6-10, 12-17, and 21-22 all allege the use of false testimony or fabricated evidence, and grounds 19-20 allege the use of "irrelevant evidence." Application for Post Conviction Relief ("PCRA") at i-iv. While Petitioner appears to point to different pieces of evidence for each ground, he has not organized the grounds into logical groups or categories. See State's Mem., Att. 2 (Letter from Attorney Crowell to Judge Fortunato of 9/7/01) at 1 (attempting to organize Petitioner's grounds into such groups).

[8] For example, the Rhode Island Supreme Court considered and rejected Petitioner's claim that the police did not have probable cause to arrest him. See State v. Johnson, 667 A.2d 523, 527 (R.I. 1995). Yet, the first ground in his PCRA is that his arrest was "made without probable cause ...." PCRA at i. Similarly, Petitioner includes in his argument in support of ground 27 the same allegedly prejudicial comments of the trial judge, see id. at 164-65, which the state supreme court found in the direct appeal to have been adequately remedied by the trial judge's instructions, see State v. Johnson, 667 A.2d at 528.

page typed letter to Judge Fortunato mentions that the order drafted by the Attorney General's office understated by twenty pages the page limitation which the Judge had set on October 18, 2002, Petitioner did not ask that the order be corrected or that he be allowed to file a thirty page complaint.[9] Rather, the only request made by Petitioner is for Judge Fortunato to tell Petitioner what he should take out, why he should take it out, and whether what he takes out will be deemed waived. Similarly, Petitioner's Motion for Clarification, which was received by the superior court on July 3, 2002, does not seek clarification of the length of the new complaint which Petitioner is to file, but instead requests that "the Court ... provide him with its reasons for issuing such directive, and from what authority such directive derives ...." State's Mem., Att. 4 (Motion for Clarification). Thus, on the face of the record before this court, Petitioner simply elected not to comply with the page limitation set by Judge Fortunato.

The questions posed by Petitioner in his October 25, 2001, letter to Judge Fortunato were at least inappropriate, and, notwithstanding Petitioner's claim that they were posed "respectfully," Letter from Petitioner to Judge Fortunato of 10/25/01, could be viewed as less than respectful. Judge Fortunato is not obliged to tell Petitioner how he should reduce his unwieldy PCRA. See In re Michael Best, No. C 01-2851 SI (PR), 2001 WL 969042, at *1 (N.D. Cal. Aug. 17, 2001)(holding that court cannot give legal advice to prospective or actual habeas petitioners); John Doe v. Dep't.

[9] A copy of Petitioner's October 25, 2001, letter to Judge Fortunato was obtained from the Superior Court Clerk's office and has been added by the court to the exhibits in this matter.

of the Navy, 764 F.Supp. 1324, 1326, (N.D. Ind. 1991)("not this court's proper function to give legal advice to *pro se* plaintiff"). That is Petitioner's responsibility. The same is true regarding his requests (contained in the Motion for Clarification) that Judge Fortunato provide "reasons for issuing [the October 18, 2001,] directive, and from what authority such directive derives ...." State's Mem., Att. 4 (Motion for Clarification) at 2. Judge Fortunato had no obligation to provide Petitioner with reasons for his October 18, 2001, ruling beyond those stated at the hearing, and he certainly had no obligation to explain to Petitioner the inherent authority of courts to control the form and length of filings. Consequently, the fact that Petitioner did not receive a response from Judge Fortunato fails to significantly advance his cause of showing that circumstances exist which render the post conviction process ineffective.

The strongest ground advanced by Petitioner is that his Motion for Clarification also requested that he be advised as to the current status of his PCRA and that this request has gone unanswered. Nevertheless, I do not find that this factor, even when viewed in the context of the other problems Petitioner has experienced, is sufficient at this point to excuse Plaintiff's failure to exhaust his state remedies. In the final analysis, the fact remains that the superior court did not refuse to hear Petitioner's PCRA. It only required that Petitioner file a concise statement of his claim, presumably so that the State could respond to it without being unduly burdened. Cf. Orbe v. True, 233 F.Supp.2d 749, 764 (E.D. Va. 2002)(holding petitioner is still bound by exhaustion requirement despite page limit on state habeas corpus proceedings). If Petitioner had complied with the October 18,

2001, ruling, his PCRA would presumably have been acted upon in due course.

In summary, notwithstanding Petitioner's difficulties with prior appointed counsel, hearing dates that were not kept, and the superior court's lack of response to his inquiries, Petitioner has failed to demonstrate that at this point circumstances exist which render the state post conviction remedy ineffective to protect his rights. The primary reason Petitioner's PCRA has not progressed further since October of 2001, is Petitioner's own choice not to comply with the page limitation. I do not find that the ten page limitation established by Judge Fortunato by itself renders that process ineffective where it is not clear from the record that Petitioner has explicitly sought relief from that limitation,[10] that the request for relief has been denied, and that in the absence of such relief Petitioner cannot protect his rights. Cf. Seymour v. Walker, 224 F.3d 542, 551 (6th Cir. 2000)("[T]he page limit merely limited the manner in which [petitioner] could present [his] arguments; it did not wholly prevent [his] from presenting them.")(internal quotation marks omitted).

Conclusion

For the reasons explained above, I recommend that the Motion to Dismiss be granted,[11] but that the Petition be

[10] In noting that Petitioner has not explicitly sought relief from the ten page limit, this court does not intend to suggest that a failure to grant such relief would necessarily establish that the state post conviction relief process is ineffective to protect Petitioner's right. A page limitation is clearly warranted.

[11] Technically, the State's Motion to Dismiss Applicant's Petition for Writ of Habeas Corpus ("Motion to Dismiss") was not formally referred to this Magistrate Judge for findings and recommended disposition. However, the Motion to Dismiss is based on Petitioner's failure to exhaust his state remedies, and I have concluded that the Petition should be dismissed on that basis.

dismissed without prejudice. Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within ten (10) days of its receipt. See Fed. R. Crim. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

David L. Martin
United States Magistrate Judge
Date: April 17, 2003

Therefore, a recommended disposition of the Motion to Dismiss is also included here.